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NO. 03-801

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

SAM REED, SECRETARY OF STATE OF THE STATE OF WASHINGTON,

Petitioner,

v.

DEMOCRATIC PARTY OF WASHINGTON STATE; REPUBLICAN STATE COMMITTEE OF WASHINGTON; LIBERTARIAN PARTY OF WASHINGTON, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REPLY TO BRIEFS IN OPPOSITION TO PETITION[1]

1. There Is A Conflict Between The Ninth Circuit Court Of Appeals Decision And The Decisions Of The Washington State Supreme Court

As the petition points out at pages 7-8, the decision of the Ninth Circuit in this case invalidates Washington's blanket primary, an election system which has been in place since 1935 and has twice been upheld by the State's highest court. *Anderson v. Millikin*, 186 Wash. 602, 59 P.2d 295 (1936); *Heavey v. Chapman*, 93 Wn.2d 700, 611 P.2d 1256 (1980). In response, the Democratic Party suggests that the Washington state court decisions are "stale" and the Republican Party denigrates the state court decisions as "entitled to no deference". Dem. Party Resp. at 19-21; Rep. Party Resp. at 15-18.

Anderson and *Heavey* are thoughtful, considered decisions in which the State's highest court weighed the interests of the political parties, of individual party officers, and of the State, and upheld Washington's primary, rejecting a variety of challenges based on both the state and federal constitutions. *Anderson* is not based, as the Democratic Party suggests on page 19 of their brief,

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[1] Two of the adverse parties in this case, the Democratic Party of Washington and the Republican State Committee of Washington, filed briefs in opposition to the Washington Secretary of State's petition. This is a combined response to both briefs, which will be referred to, respectively, as the "Democratic Party Response" and the "Republican Party Response".

on the notion that the Constitution "provides no First Amendment Protection to political parties". Indeed, the decision notes that Washington's statute "makes no attempt to control the inherent power of a political party to adopt principles and to require its members, and especially its officials, to give adherence thereto". *Anderson*, 186 Wash. at 608. The court concluded, however, that in the context of Washington's election system, the parties had shown no constitutional interest overcoming the State's interest in determining how candidates should qualify for the general election ballot. *Id.* at 604-06.

If the Washington Supreme Court had the opportunity to reconsider these decisions in light of *California Democratic Party v. Jones*, 530 U.S. 567 (2000), or other recent decision of this Court, it might modify or reverse its previous decisions, or it might find a basis for distinguishing Washington's primary from the California primary which was the subject of *California Democratic Party*. The state courts have not had that opportunity, however. Only this Court has the authority to resolve the conflict between the state cases and the circuit court decision in this case.

2. *California Democratic Party* Does Not Resolve This Conflict Because Washington Does Not Use Its Primary To Choose Political Party Standard Bearers

The petition sets forth in some detail the distinction between the California election invalidated in *California Democratic Party*, in which political party candidates or "standard bearers" for various offices were chosen in the primary, and Washington's election system, which merely

winnows the field of candidates to make the general election ballot more manageable. Pet. at 11-13.

The political parties assert that Washington's system, like California's, is actually a party nomination system. Dem. Party Resp. at 11-13; Rep. Party Resp. at 8-10. They quote a handful of state statutes in which the word "nominee" appears in close proximity to "party" but misunderstand the context of those references. As noted in the petition, Washington's election system seeks to maximize the choices available to state voters in the primary, without yielding the benefits of vigorous party competition in the general election. To these ends, state law (1) allows candidates to state their party affiliation; (2) takes party affiliation into account in determining who advances to the general election ballot; (3) treats minor parties more leniently in order to increase their chance of participating in the general election; and (4) gives political party organizations a limited role in filling vacancies on the ballot. The purpose of these is to retain the benefits of a true partisan election without, however, turning the primary into a process for nominating "political party" candidates. The candidates are nominated by and for the general electorate.

The political parties actually appear to be arguing that *any* process for nominating candidates for partisan office is a "party nomination process" and that the political parties have a constitutional right to determine how the nomination process will be conducted. Nothing in *California Democratic Party* suggests that a state must pay such a high

price merely by defining some offices as "partisan" in nature.[2]

3. Washington's Blanket Primary Was Not Before This Court In *California Democratic Party*

Both political parties suggest that Washington's blanket primary has already been invalidated by this Court because extensive evidence about the Washington primary was introduced in the California litigation and was considered in reaching a decision in *California Democratic Party*. Dem. Party Resp. at 4-6; Rep. Party Resp. at 10-13. These suggestions are based, again, on the notion that Washington's election system is indistinguishable from California's.

The point of the petition is to show that Washington's election system is, in fact, quite different from California's, thus changing the context in which the blanket primary is used. This Court has never had the opportunity to explore these distinctions, and Washington has never had the

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[2] The political parties also cite certain state court decisions and attorney general opinions using the phrase "nominee of a party" or something similar. Since Washington's system produces, in each general election, no more than one candidate for a given office affiliated with a particular party, it is inevitable that this candidate will loosely be referred to as that party's "candidate" for an office. Before *California Democratic Party* was decided in 2000, no one had need to distinguish carefully between the candidates who appear on Washington ballots and the true "party nominees" produced by the systems of certain other states. The Court should base its analysis on the true nature of Washington's election system, not on loose historical labels.

opportunity to assert them. It is interesting that the political parties would refer the Court to the record in the California case, when they in fact introduced no competent evidence in the present case showing how Washington's blanket primary actually harms their constitutional interests.[3]

CONCLUSION

For the foregoing reasons, the Petition For Writ Of Certiorari in this matter should be granted.

RESPECTFULLY SUBMITTED.

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[3] The Democratic Party Response at pages 8-10 also asserts that Washington has "conceded" that its blanket primary is unconstitutional, based on language in an agreed temporary injunction order entered when the case was filed. This argument is inaccurate and irrelevant. Washington has vigorously defended the blanket primary throughout this case, and with success at the trial court level. Even if the criticism were accurate, the Court would not be bound by a concession on a purely legal issue. See *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604, 622 (1996), and cases cited therein.